

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division**

In the matter of:

LARRY ALLEN DENNIS
(Chapter 7 Case 93-40713)

Debtor

**JAMES L. DRAKE, JR.,
TRUSTEE**

Plaintiff

v.

**LARRY DENNIS II
TAMMY ANN DENNIS**

Defendants

Adversary Proceeding

Number 93-4147

FILED

at 9 O'clock & 26 min. AM

Date 9-1-95

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia



**ORDER ON DEFENDANTS' MOTION FOR RELIEF FROM
ORDER ENTERED ON OCTOBER 4, 1994**

The above pleading was filed by Tammy Ann Dennis and Larry Dennis II on July 21, 1995, and raises a number of arguments as to why this Court's Order of

October 4, 1994, should be set aside pursuant to F.R.Civ.P. 60 which is incorporated in the Bankruptcy Rules by Bankruptcy Rule 9024.¹

Initially, the Defendants allege that the Court lacks jurisdiction over the persons and the subject matter in issue. This allegation is totally without merit. The Order of October 4, 1994, arising from an adversary proceeding, voided the transfers of real estate from the debtor, Larry Allen Dennis, to his son, Larry Dennis, II, and then from the son to the debtor's wife, Tammy Ann Dennis. The Court clearly has jurisdiction over an action to recover property for the estate of Larry Allen Dennis by the Trustee and over the individual defendants. *See* 28 U.S.C. § 1334; 28 U.S.C § 157(a).

To the extent that the Defendants assert that Larry Allen Dennis was a necessary party who was not named as a Defendant, the motion sets forth no sound basis for setting aside this Court's final order and judgment. Bankruptcy Rule 7019 adopts Rule 19 F. R. Civ. P. and governs this issue. In pertinent part, rule 19 states, "[a] person . . . shall be joined as a party in the action if . . . the disposition of the action in the person's absence may . . . as a practical matter impair or impede the person's ability to protect that interest" Larry Allen Dennis testified at the trial.

¹ Larry Allen Dennis has filed an amicus brief.

Both Larry Dennis, II, and Tammy Ann Dennis were afforded the opportunity to question the witness. As previously mentioned, the adversary proceeding ultimately voided the transfers of real estate from Larry Allen Dennis to Larry Dennis, II, and from Larry Dennis, II, to Tammy Ann Dennis. Regarding the rights of Larry Allen Dennis, the adversary proceeding actually recovered an asset for the estate of Larry Allen Dennis, therefore, reducing the personal liability of Larry Allen Dennis. Thus, since the adversary proceeding actually benefitted the estate of Larry Allen Dennis to the fullest, his presence as a named defendant was anything but necessary.

The Defendants' motion also alleges that there is newly discovered evidence which justifies that the judgment be set aside. This assertion is without merit. Taking the pleadings at face value, it appears that an indebtedness in the amount of \$17,200.00 owed to the State of Kentucky was not in fact owed and that an indebtedness owed by Mr. Dennis to one George Barnett may have been entitled to partial credit. The Motion has an attached affidavit of one Linda Payton, unit manager of the governmental exam unit of the Division of Tax Administration for the State of Kentucky, which supports the Debtor's contention concerning his 1985 and 1986 taxes. It also attached a copy of a deposition of George Barnett. While the affidavit from the State of Kentucky indicates that the \$17,200.00 tax liability the alleged liability in fact was zero, the Barnett deposition is much less clear although it

appears that the Barnett proof of claim failed to credit the Debtor for the interest which accrued for about a two year period on \$10,000.00 which Mr. Barnett estimated would amount to approximately \$100.00 per month or \$2,400.00.

Although this evidence may be true, it fails to constitute newly discovered evidence within the meaning of Bankruptcy Rule 9024. That Rule incorporates Rule 60(b)(2) which creates as a reason for relief from a final judgment or order "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)" which requires motions for new trial to be served not later than ten (10) days after the entry of a judgment. There is nothing set forth in this Motion which indicates that this information was not known to or could not reasonably have been discovered in advance of the trial of this case. Further, in the bankruptcy context, relief under Rule 60(b) is an extraordinary remedy. See In re Design Classics, Inc., 788 F.2d 1384 (8th Cir. 1986). The grant or denial of the remedy lies within the discretion of the trial judge. Id. at 1385. Accordingly, I conclude that it does not constitute newly discovered evidence within the meaning of the rule and the Motion is therefore denied.

All of the other allegations are either immaterial to the outcome, or are nothing more than an attempt to collaterally attack this final judgment and as a

result the Motion is denied.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 30th day of August, 1995.